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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1001

MARTIN J. HODAS,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The judgment of the Court of Appeals (App. A, *infra*, p. 51) was rendered without written opinion. The District Court judgment was rendered on jury verdict and no written opinion was entered. The opinion of the District Court denying petitioner's motion to suppress is annexed hereto as App. B, *infra*, pp. 53-61.

Jurisdiction

The judgment of the Court of Appeals was entered on December 16, 1975. This Court has jurisdiction under 28 U.S.C.A. 1254(1).

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Questions Presented

1. Whether a Judge, in connection with the simultaneous issuance of two search warrants for the search of two separate premises, can consider the information set forth in an affidavit made in application for one such warrant in connection with the issuance of the other warrant, or whether the issue of probable cause for the issuance of each warrant must be determined solely on the basis of the information set forth in the affidavit applying for such particular warrant?

2. Whether there is probable cause for the issuance of a search warrant for all books and records involving the alleged violation of a state penal law provision proscribing the wholesale distribution of obscene materials, on the basis of an affidavit which alleges that an identically titled film to that allegedly found on the workshop premises of the lessee of the premises sought to be searched was "deemed" obscene in a non adversary proceeding by another Judge nearly one month prior to the date of the application for the warrant, which film was never asserted to have been found obscene in an adversary proceeding thereafter, and which film was not subjected to prior scrutiny by the Judge issuing the warrant for the search of books and records of the alleged wholesaler thereof?

4. Whether a warrant for the search and seizure of all of the books and records of an exhibitor of expression presumptively protected by the First Amendment at a specified premises which evidence the commission of a crime of wholesaling obscene material, constitutes a general warrant in violation of the First, Fourth and Fourteenth Amendment under the doctrine of *Stanford* v. *Texas*, 379 U.S. 476?

6. Whether the seizure of virtually all of the books and records of an entity involved in the exhibition of expres-

sion presumptively protected by the First Amendment, necessarily resulting in the closing of the business, involves a total prior restraint within the doctrine of *Near* v. *Minnesota*, 283 U.S. 697, in violation of the First Amendment, and, as such, an unreasonable search and seizure within the meaning of the Fourth Amendment as construed in *Roaden* v. *Kentucky*, 413 U.S. 496?

Constitutional Provisions Involved

1. First Amendment

   "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

2. Fourth Amendment

   "The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Preliminary Statement

Martin J. Hodas, appeals from a judgment of the U. S. Court of Appeals for the Second Circuit, entered December 16, 1975, affirming a judgment entered in the United States District Court for the Southern District of New York (Metzner, J.) on July 24, 1975, convicting him of an attempt to defeat and evade $65,397.37 in corporate income taxes due and owing to the United States of America for the fiscal year ending February 28, 1969, said taxes being owed by East Coast Cinerama Theatre, Inc., a New York corporation and convicting him of causing to be made, and subscribing to, a corporate income tax return

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which he did not believe to be true and correct as to every material matter, said return being for the corporation designated above and for the taxable year designated. Defendant Martin Hodas therefore stands convicted of violations, respectively, of Section 7201 of Title 26 of the United States Code, and Section 7206 of Title 26 of the United States Code.

The indictment presented in this case contained three counts, the first of which was a conspiracy count relating to the substantive violations alleged in Count 2. Mr. Hodas was acquitted of the Count 1 conspiracy charges, as was his co-defendant, Herbert J. Levin, who was himself acquitted of all three counts.

On May 19 and May 20, 1975, in the District Court, a hearing was conducted by Judge Metzner to inquire into the facts and circumstances surrounding searches conducted by New York police officers on January 27 and January 28, 1972 at two physical locations, namely, 210 East 42nd Street in New York City and 113 East 42nd Street in New York City during the course of which searches physical evidence critical to the case of the United States Government under this indictment, namely, certain duplicate books and records of East Coast Cinerama Theatre, Inc., were seized by those New York City police officers, copied, and turned over to the Internal Revenue Service of the United States and were eventually employed in the presentation of evidence by the United States of America, and are specifically referred to in Count 1 of the indictment.

Statement of Facts

(1)

On January 27, 1972, Detective Donald Gray of the New York City Police Department, together with officers of that Department (6), acting pursuant to a search

warrant issued by Judge Hyman Solniker of the New York City Criminal Court, proceeded to the "Black Jack" bookstore at 210 West 42nd Street in the County of New York.

In the course of the authorized search of said premises for "business records" relating to the sale of an allegedly obscene book, Detective Gray entered into a separated and segregated rear of the ground floor at 210 West 42nd Street and conducted an additional search of that area and interrogation of an employee of East Coast Cinematics, Inc., lessee of that rear area, working therein. During this second and separate search and inquiry conducted under the ostensible cloak of authority of Judge Solniker's warrant, Detective Gray and other officers seized various boxes of film, each box marked on the outside with a different name, and brought these films to Judge David Weiss of the New York City Criminal Court for his review. Without any indication on the face of the warrants of a review of these two films brought to him, and without any determination of the obscenity thereof, but solely upon the affidavits of Detective Gray, Judge Weiss issued two further search warrants. The first of these additional warrants authorized the search for, and seizure of the three films mentioned in the affidavit for the warrant to seize at 210 W. 42 St.

The second additional warrant authorized a search of the offices of East Coast Cinematics, Inc. on the 17th floor at 113 West 42nd Street in New York County for books and records of that corporation reflecting a "peep show" business in violation of Section 235.06 of the Penal Law of New York State. This warrant was based solely on the statement of Det. Gray that a film that had not been produced for scrutiny by Judge Weiss was found at 210 W. 42 St. and bore the title (Sex Nurse) of a film which had been "deemed" obscene by another judge nearly one month before in another case in the course of a non-adversary application for a search warrant.

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In the execution of the warrant to search the corporate offices of East Coast Cinematics, Inc., Detective Gray and other officers forced an entry into said offices and commenced a search of same for all books and records indicating a violation of the New York Penal Law involving the wholesale distribution of obscene material. In the course of conducting this search, and upon his initial entry into the premises, Detective Gray observed a listing of the names of various corporate entities which he assumed were housed with the offices of East Coast and concluded that the intermingling of books and records and related business materials of these corporations within the 17th floor premises rendered a seizure of the material mandated in the original warrant totally impractical.

As a result of the above conclusion Detective Gray swore out an additional affidavit and returned to the New York City Criminal Court, this time to Judge William Shea from whom he obtained a warrant authorizing him for all practical purposes to seize every item in the offices of East Coast Cinematics, Inc. and related corporations.

Testimony at the hearing on the suppression issue presented by the defendant seemed to place in evidence the inter-relationship of the work shop area at 210 West 42nd Street with the office area at 113 West 42nd Street, Mr. Herbert Levin, an employee of Mr. Hodas, frequently visited this work shop area and supervised activities therein. Employees of East Coast Cinematics, Inc. frequently made trips between these premises to pick up or deliver the various work products of the shop. Martin J. Hodas also repeatedly and regularly visited these work shop premises.

The search conducted by Detective Gray and his fellow officers of the East Coast offices at 113 West 42nd Street resulted in the seizure of virtually every document, instrument, book, record and numerous personal articles which were to be found therein.

Detective Gray testified that the office areas were open and not segregated in any way and it appears from his testimony that there was a free flow and movement of employees within these offices and that areas reserved for the use of given individuals were not visibly demarcated as such.

Reasons for Granting the Writ

During the suppression hearing cross-examination of Detective Gray (upon whose affidavits the warrants for the search of appellant's two premises were based) he testified quite conclusively and repeatedly that he seized three films from the premises and brought them to Judge Weiss for the purpose of having warrants issued to search and seize from defendant's premises at 210 West 42nd Street and 113 West 42nd Street. On redirect, he changed his story and stated that he did not take any of the three films from the premises, but rather obtained two copies of prints with the same names which had been seized in other raids on other stores and brought them before Judge Weiss. The Court totally ignores the unequivocating testimony of Detective Gray repeatedly uttered on cross-examination and finds as a fact his recanted testimony. Furthermore, the opinion below does not even comment on the fact that there is no indication from the face of Judge Weiss' warrant for the search of 210 West 42nd Street that he viewed the two films that were brought to him and found them obscene prior to issuance of the warrant. Without such viewing and finding it cannot be doubted that the warrants would be invalid under the doctrine of *Heller* v. *New York*, 413 U.S. 483 (1973). Furthermore, since Gray recanted his testimony with respect to the film "Sex Nurse" and denied on redirect examination having brought that film before Judge Weiss, and since that film was the only film mentioned in the warrant for the search of 113 West 42nd Street issued by Judge Weiss, it must be concluded that the Judge could not have possibly viewed the film and deter-

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mined its obscenity for purposes of issuing that warrant out of which all of the evidence in the instant trial was secured. This, too, is ignored by the Court below in its opinion. It cannot be overemphasized that not only did the warrant for the search of 113 West 42nd Street issued by Judge Weiss not set forth that he had viewed the film mentioned in the warrant ("Sex Nurse") and determined that it was obscene, but Detective Gray, in testimony accepted by the Judge below, his redirect testimony, admitted that he never brought the film for scrutiny to Judge Weiss. The Court below seems to rest its finding as to this warrant on the "deeming" which had taken place a month earlier in connection with another film of the same name brought to another judge. The Court, however, failed to explain how it could depend upon such deeming when a warrant issued by that prior Judge over ten days before the seizure in the instant case could not have been used to make the seizure in the instant case even if the premises had been described in that warrant since, by its terms, it was only effective for 10 days.

The testimony at the hearing clearly indicated that there had never been a determination of the obscenity of the film "Sex Nurse" to the knowledge of Detective Gray to the date of the hearing. It had never been found obscene by any Judge at any time. Notwithstanding the foregoing, the Court below upheld the seizure of all of the books and records of defendant at 113 West 42nd Street, records which supplied the essential testimony for the conviction of defendants herein, on the basis of the mention therein of one film, "Sex Nurse", which the Judge did not even see prior to the issuance of the warrant, which had not been the subject of an adversary proceeding to that date, which has not been the subject of an adversary hearing to this very day, and which does not even appear on the inventory return as having been seized.

The trial Court concluded that defendant had standing to challenge both the warrant issued and the exe-

cution of that warrant as to 113 West 42nd Street. This is the premises in which the materials sought to be suppressed were found. The Court skips over the "deeming" issue and the fact that Judge Weiss never saw the film "Sex Nurse" which was the basis for the issuance of the warrant to search and seize the books and records of East Coast from 113 West 42nd Street. He finds that he need not discuss that issue since the seizure of all of the books and records of a corporation pursuant to a warrant which does not designate specifically which books and records are subject to seizure does not violate First Amendment principals against prior restraint as incorporated into the Fourth Amendment. Totally ignored is a line of cases commencing with *Near* v. *Minnesota,* 283 U.S. 697 (1931) and running through *Stanford* v. *Texas,* 379 U.S. 476 (1965) and *Roaden* v. *Kentucky,* 413 U.S. 496 (1973). The trial Court could not visualize a business engaged in the dissemination of First Amendment material being shut down and closed through the seizure of all of its books and records. This is exactly what happened in the instant case and exactly what was condemned in a companion case by the Courts of the State of New York. *People* v. *Star Distributors, Ltd.*—Supreme Court, New York County, N.Y.L.J., January 18, 1973, Page 15, Column 6 (Martinez, J.). The massive seizure under the Weiss warrant for the search and seizure of all books and records of East Coast was condemned by this Court and the materials ordered returned. *Hodas* v. *Hogan,* 72 Civ. 554 (S.D.N.Y., February 15, 1972—Bauman, J.). Judge Bauman appreciated that the seizure at 113 West 42nd Street was a massive seizure in violation of the First, Fourth and Fourteenth Amendments, a seizure which required immediate return of that which was seized. While it is true that Judge Bauman in *Hodas* v. *Hogan* did not have the benefit of the Supreme Court decision in *Roaden* v. *Kentucky, supra,* and, therefore, insisted upon ensuring the right of the People of the State of New York

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to secure that material as future evidence, the Court below was in no such position. In *Roaden* it was clearly held that a seizure in violation of the First Amendment is an unreasonable search and seizure under the Fourth Amendment and that any tenuous distinctions theretofore made by various Courts could no longer be sustained. Thus when the Court below held that the purpose behind such holdings as that in *Hodas* v. *Hogan, supra,* is to avoid prior restraint but not to sanction suppression, it was making a finding directly in violation of *Roaden. Roaden* recognized that the only way to ensure against prior restraints of expression was to treat such prior restraints in the same manner as any other unlawful searches and seizures, by suppressing the use of the material seized. The attempt by the Court below to utilize the *Heller* ruling to justify the warrant for the search of 113 West 42nd Street manifests an utter and complete lack of comprehension of *Heller.* In *Heller,* the Judge issuing the warrants scrutinized the entire film, found it obscene, and issued the warrant for the arrest of its exhibitor and its seizure. In the instant case Judge Weiss did not see the film which was the basis for the issuance of the warrant, and then issued a warrant for the seizure of all of the books and records of the alleged "distributor" of the film.

The Trial Court then goes on to state that affidavits for warrants must be construed liberally and flexibly. This begs the question. It is not solely the affidavit for the warrant that presents the problem in this case, but also the warrant itself. Nowhere does the Court cite the hornbook law that a warrant must specifically state and identify the place to be searched and the matter to be seized. When First Amendment rights are involved, particularization of the matter to be seized becomes even more essential. This is why *Stanford* held the warrant in that case to be a general warrant and all matters seized to be suppressible. This is why *Roaden* cites *Stanford*

when incorporating the First Amendment principles of search and seizure into the Fourth Amendment.

In his opinion (App. B, *infra*, p. 60) the trial Judge below attempts to muddle and entwine the two applications for the two separate warrants, one for the search at 113 West 42nd Street, and the other for the search of 210 West 42nd Street. He argues that the viewing by Judge Weiss of the two films in connection with the affidavit for the search of 210 West 42nd Street and the deeming of Judge Weiss that such films were obscene (despite the fact that there is no recitation in the warrant of such viewing and determination), somehow justified the issuance of the warrant based on another application for the search of 113 West 42nd Street. No case is cited by the Trial Court for this novel theory of judging the adequacy of a warrant on the basis of material other than the contents of the affidavit seeking such warrant and the warrant itself. The reason is simple, there is no authority for such action.

At the end of the Opinion below (App. B, *infra*, p. 61) the Court feels compelled to explain why Judge Bauman's decision in *Hodas* v. *Hogan*, *supra*, is not controlling or even persuasive. It is stated that the intervention of *Heller* v. *New York*, *supra*, "prevents the operation of collateral estoppel". It is respectfully submitted, as has been noted heretofore, that *Heller* has absolutely nothing to do with the facts of the instant case. All *Heller* held was that no adversary proceeding was required prior to the seizure of a single copy of expressive matter where there has been prior judicial scrutiny of the matter, a determination by the Judge of its obscenity, and the granting to the seized party of a reasonably prompt adversary hearing after the seizure. The warrant for the seizure of all of defendant's books and records was not preceded by prior judicial scrutiny of expressive matter, a determination of obscenity, and a prompt opportunity for an adversary hearing. *Heller* has no relation whatsoever to

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the massive seizure of books and records in the instant case. The only recent case that does have a definite relation to the seizure at 113 West 42nd Street in *Roaden* v. *Kentucky, supra.*

The Trial Court decision below concludes with a statement that the seizure of business records is essential to the proving of a crime of wholesale promotion of obscene materials. It is respectfully submitted that this does not justify the wholesale seizure effecting a prior restraint. There are many things that the government would like to seize and that might help the government prove a case against a particular defendant, but which may not be seized in the particular manner which the government attempts to pursue. To follow the Trial Court's reasoning, it is permissible to burn the house to roast the pig. It is respectfully submitted that this is not the law, that the State Court Judge who suppressed the evidence of the instant case and the Federal Court Judge who found a massive seizure warranting return of the material were both correct, and that the Trial Court below erred by failing to be guided by their determinations and the sound constitutional principles which underlay such determinations.

Since the case of *Stanford* v. *Kentucky, supra,* is crucial on the issue of whether or not the 113 West 42nd Street warrant was a general warrant and, hence, void on its face, it should be noted that the Trial Court's understanding and review of that case was superficial to say the least. Judge Weiss's warrant for the search of 113 West 42nd Street did not specify with any particularity which records of defendant were or were not to be seized. It, therefore, left to the unfettered discretion of the police officers executing the warrant the determination of what material effecting the distribution of expressive matter presumptively protected by the First Amendment should and should not be seized. A cursory glance at the inventory of things seized reflects the gravaman of such a procedure and the

reason why the Fourth Amendment and the statutes of the State of New York require specificity of "things to be seized" and not merely specificity of places. The language of the 113 West 42nd Street search warrant cannot be differentiated from the search warrant which *Stanford, supra,* unanimously held void as a general warrant.

In *Stanford, supra,* under Texas Law, Texas outlawed various activities of the Communist party just as New York outlaws "obscenity". A District Court Judge in Texas authorized a search for and seizure of the books and records concerning the operations of the Communist party.

The Supreme Court in *Stanford* described the search warrant as follows (379 U.S. at 478, 479):

> ". . . a place where books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas are unlawfully possessed . . ."

Stanford unanimosuly held the search warrant overbroad and void as a general warrant.

Stanford emphasized that the particularity was specially required where the "things" to be seized consisted of books and records of those engaged in the exercise of First Amendment rights (379 U.S. at 485), citing the classic First Amendment obscenity case of *A Quantity of Books* v. *Kansas, supra,* 378 U.S. 205. *Stanford* held the Courts must be even more careful where the business records and ledgers dealt with one exercising First Amendment rights as opposed to one keeping invoices and records of stolen property (379 U.S. at 485 Nt. 16).

The Court said (379 U.S. at 485):

> "In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be

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> accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. See *Marcus* v. *Search Warrant*, 367 U.S. 717; *A Quantity of Books* v. *Kansas*, 378 U.S. 205. No less a standard could be faithful to First Amendment freedoms."
>
> * * *
>
> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. *As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.*" (Italics supplied)

Stanford held the warrant void.

People v. *Star Distributors, Ltd., et al.*, Sup. Ct. New York County, N.Y.L.J. 1/18/73 Page 15 Column 6 (Martinez, J.) involved exactly the same principle and a search warrant which as far as books and records were concerned was as broad as the warrant here involved. The Court granted the motion to suppress on the basis of *Stanford* v. *Texas*.

It should be noted that *Stanford* was emphatically relied on and quoted with approval in *Roaden* v. *Kentucky, supra*, 413 U.S. 496, at 504 (1973), the most recent decision of the Supreme Court dealing with search and seizure in the area of obscenity.

The Court of Appeals affirmed from the bench, without written opinion, holding that *U. S.* v. *Scharfman*, 448 F2d 1352, controlled this case without regard to First Amendment principles.

The basic error of the Court below was its failure to recognize the holdings of *Roaden* v. *Kentucky*, 413 U.S. 496, and *Stanford* v. *Texas*, 379 U.S. 475, that the Fourth

Amendment must be read in the light of First Amendment principles when the warrants are directed at material presumptively protected by the First Amendment and books and records of the disseminators of such material.

In the course of oral argument before the Court of Appeals, it became apparent that the Court intended to uphold the Weiss warrant for the search of 113 West 42nd Street on basic Fourth Amendment principles without regard to First Amendment implications arising from the fact that matter presumptively protected by the First Amendment gave rise to the issuance of the warrant and a business involved in the exhibition of such material was the subject of a total prior restraint by reason of such issuance and execution.

When a member of the panel asked the attorney for the appellant why they could not consider the affidavit submitted in connection for the application for a warrant to search and seize at 210 West 42nd Street in conjunction with the application for a warrant to search and seize at 113 West 42nd Street, both affidavits having been submitted simultaneously in connection with the application to Judge Weiss for the two warrants, and why the testimony at the suppression hearing could not bolster the affidavits on the issue of probable cause to issue the warrant, it became apparent that the determination of the Court below would be upheld on the basis of clearly erroneous principles.

Similarly, when in the course of argument, the panel made it apparent that it was bound by the Second Circuit opinion in *U. S.* v. *Scharfman,* 448 Fed. 2d 1352, and was unwilling to draw a distinction between stolen furs, contraband *per se,* and motion picture films presumptively protected by the First Amendment, the oral opinion of the Court rendered from the bench, relying on *Scharfman* and ignoring *Stanford* v. *Texas,* 379 U.S. 476, came as no surprise.

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When, in the course of oral argument, appellant's counsel suggested to the panel that, at the very least, the warrant for the search at 113 West 42nd Street should have been limited to the search for books and records involving the exhibition and distribution of the one allegedly obscene film mentioned in the affidavit seeking such warrant, no response from either the panel or the Assistant United States Attorney to such observation and contention was made. When it was called to the attention of the panel that the one film mentioned in the affidavit seeking the warrant for the search of 113 West 42nd Street was neither brought before the Judge for the purpose of prior judicial scrutiny nor even seized as authorized by the 210 West 42nd Street warrant or mentioned in the return thereon, facts which the police officer making the seizure could not explain in his suppression hearing testimony, no response or explanation was forthcoming from the United States Attorney.

It cannot be overemphasized that the Court of Appeals upheld the search and seizure of all books and records at 113 West 42nd Street as if the unseen, unfound and unseized film "Sex Nurse" were narcotics or explosives actually found to have been stored and possessed by appellant. If this search and seizure is upheld, all a police officer need do to obtain a warrant to search and seize all of the books and records of a business involved in the exhibition or dissemination of films or literature presumptively protected by the First Amendment, is to state that he found one such book or film in another premises controlled by such business which film or book has the same title as a film or book theretofore deemed obscene by another Judge in a non adversary proceeding at a time when, had the other Judge issued a search warrant, it would have been stale for the purposes of execution. The police officer could mention the name of any film or book, since the fact that he failed to seize it and list it on the inventory was not considered probative.

The implications of this precedent are devastating. Should this procedure be sanctioned, the entire body of law forbidding prior restraint, commencing with *Near* v. *Minnesota,* 283 U.S. 697, and *A Quantity of Books* v. *Kansas,* 378 U.S. 205, through *Roaden* v. *Kentucky, supra,* and *Stanford* v. *Texas, supra,* will have been effectively abolished, and books and films will have become contraband *per se,* subject to doctrines such as that enunciated in *U.S.* v. *Scharfman, supra,* which effectively upholds the issuance of a general warrant so long as a particular penal law section is incorporated in the search authorization portion of the warrant. It is foreseeable under such circumstances that, at some time in the future, should a newspaper or publisher print material which an official considers libelous, such official could procure a warrant from a Magistrate which would authorize the search and seizure of virtually all of the books and records of such publisher or newspaper which indicate the commission of the crime of criminal libel. The fact that this would certainly shut down the publisher or newspaper would not be considered relevant by the United States Court of Appeals for the Second Circuit which would cite *U. S.* v. *Scharfman* as authority for the issuance of the said warrant.

It is respectfully submitted that the incarceration of an alleged income tax evader for one year, laudable as it may seem, does not justify the establishment of the precedent, which the perfunctory affirmance by the Court of Appeals herein has engrafted upon First Amendment law. It cannot be assumed that the precedential effect of this ruling will be ameliorated by discriminatory law enforcement.

It is no longer a subject of debate that a search and seizure in violation of the First Amendment constitutes an unreasonable search and seizure within the meaning of the Fourth Amendment. *Roaden* v. *Kentucky,* 413 U. S. 496 (1973). In *Roaden,* the Supreme Court put to rest any distinction between the remedies for First and Fourth

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Amendment violations, by saying at page 504:

> "Such precipitant action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the book store or the commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression." Citing and quoting *Stanford* v. *Texas*, 379 U. S. 476, 485.

Thus, it is clear, that if the searches, seizures and warrants were violative of the First Amendment, they are unreasonable under the Fourth Amendment and result in the suppression of the material obtained thereby.

The District Court ruling on precisely these facts, had already determined that the seizure of all of the material from defendants' premises at 210 West 42nd Street and 113 West 42nd Street involved an unlawful search and seizure under the First Amendment. *Hodas, Levin, et al.* v. *Murphy, et al.*, 72 Civ. 554—February 15, 1972—Bauman, J. Merely by reason of the foregoing, and for no other reason, all of the matter covered by Judge Bauman's decision and returned pursuant to Judge Bauman's unappealed order should have been suppressed. The warrant upon which the search of defendants' premises at 210 West 42nd Street was based was founded upon an affidavit of Detective Donald Gray which sought the seizure of three specific films which the said detective claims he observed in his prior search of the premises. The affidavit

asserted that a film with the same title ("Sex Nurse") had been subjected to a prior judicial scrutiny by another judge (Judge Haft) on another date (December 29, 1971—nearly one month before) in connection with some unspecified other proceeding and had been "deemed obscene" at that time. As to the other two films sought to be seized, the affidavit alleges neither prior judicial scrutiny nor a determination of obscenity after an adversary hearing. It is clear from the affidavit which sought the seizure of the three films at 210 W. 42 St., that they had not yet been seized from defendant's premises. This affidavit is apparently contradicted by the subsequently recanted testimony of Detective Gray on cross-examination in which he first claimed to have seized the films from the workshop and brought them before Judge Weiss.

As to the warrant for the search of 113 W. 42 St., all that supported it was the assertion that a film with the same name as that on a box at 210 West 42 St. (Sex Nurse) had been deemed obscene by another judge in a non-adversary proceeding with respect to another party almost 30 days before.

It cannot be asserted that the prior judicial scrutiny by another judge at another time in connection with another proceeding of a similarly entitled film to one of the films seized pursuant to Judge Weiss' warrant legalizes the warrant and the seizure herein. It was the position of the District Attorney of New York County and the police department until the middle of 1973 that once a judge scrutinized a film or book and determined that there was probable cause to believe it obsecene, the title of that film and book could be put upon a list and the police, through warrantless searches of premises exhibiting such films and selling such books, could seize such "deemed" films or books whenever they would come across them. This situation came to a head in the case of *People* v. *Gomez,* 73 Misc. 2d 623, when the illegality of the pro-

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cedure was directly challenged. In that case which was not appealed by the People, Judge Levittan held at page 625-6;

> "In the instant prosecution the People contend that prior judicial scrutiny is alone sufficient, without a warrant specific to this prosecution as long as the prior scrutiny was facilitated by an unrelated warrant. The issuance of a warrant is not merely auxiliary to ex parte scrutiny and a finding of obscenity. Rather, the purpose of the prerequisite judicial scrutiny is to generate the warrant. The scrutiny is necessary to justify the warrant which is necessary to authorize the seizure. The scrutiny and ex parte finding are not a substitute for the warrant itself nor an excuse from obtaining it for each separate seizure.
>
> "Apart from the constitutional and statutory indispensibility of a warrant for each seizure in this area sought by police authorities, the practice of using a warrant issued by a judge for a specific seizure as an imprimatur for other seizures not presented to that judge for his approval, is not to be sanctioned. Separate application for each seizure sought by the police is not burdensome to the court, nor, if it were, would it for that reason be indispensable."

The police department has abandoned the procedure used in the instant case and is no longer asserting the right to seize "deemed" films without a specific warrant for such seizure in a specific place signed by a judge who has viewed the film and determined the probable cause to believe the film obscene. It is this abandoned procedure which is the foundation for the warrant for the search of defendants' premises at 210 West 42nd Street and 113 West 42nd Street. It cannot be overemphasized that the procedure used in obtaining the warrant in the instant case has been conceded by the state authorities (by their failure to appeal in *Gomez* and their abandonment of the procedure)

to be an unconstitutional Fourth Amendment violation warranting suppression. Just as the court suppressed in *Gomez* so should this court suppress herein.

The only relevant allegation in the affidavit of Donald Gray in support of the warrant to search 113 W. 42 St. is the same statement about a film entitled "Sex Nurse" having been deemed obscene theretofore by another judge in another proceeding. Judge Weiss signed a search warrant for the seizure of all books and records of East Coast Cinematics, Inc., at 113 West 42nd Street on the basis of an assertion relating to a film which he had not viewed and determined to be probably obscene, and which film was never seized (though the 210 warrant called for such seizure), indicating that it never existed at 210 West 42nd Street.

It should be noted that even had another judge in another proceeding found a film entitled "Sex Nurse" probably obscene after judicial scrutiny of the film, the only purpose of such finding would be to issue a warrant for seizure or arrest in order to facilitate the prompt adversary hearing upon which the said film could be determined to be obscene vel non. Since that viewing took place on December 29, 1971, even if a warrant were issued at that time, it would have expired upon the execution thereof or within ten days, whichever first took place. It could not under any circumstances have been utilized as the basis for any subseqeunt seizure. Lastly, as *Gomez* held, it certainly could not relieve any other judge of his constitutional obligation to view the film and determine the probability of obscenity prior to issuance of a warrant for its seizure from another place at another time. The only thing that could have relieved him of such responsibility would have been a determination of obscenity of said film after an adversary proceeding.

The law as to the minimum requirements for a determination of "probable cause" for the issuance of a war-

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rant is clear in its articulation of a general standard, but mandates intensive analysis of the facts in a given case.

The general definition of probable cause can be stated as facts sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that contraband is present, or a crime is being or has been committed, or that the law is being violated on the premises to be searched. See, e.g., *Stacey* v. *Emery*, 97 U.S. 642, at 645 (1964).

It has further been pointed out by the United States Supreme Court that facts and circumstances underlying the deponent's affirmation of probable cause must be spelled out. See, e.g., *Aguilar* v. *Texas*, 378 U.S. 108, at 112 (1964).

Officer Gray attempted to set forth such facts and circumstances in his affidavit. The only *facts* presented to the issuing judicial officer is that one (1) of the boxes bore a title of a film as to which a criminal court judge nearly one month before had found probable cause to believe obscene; (2) an undescribed snapshot of that film was affixed to the outside of that one box. All the remaining language in the affidavit is conclusionary or expresses unsubstantiated "belief" of the deponent.

We submit that particularly in the circumstances of a presumptively First Amendment protected activity such as film exhibition and distribution, the affidavit does not state sufficient facts with any particularity sufficient to constitute "probable cause".

We urge the Court to find a failure of probable cause for the issuance of a warrant since the facts in Affidavit No. 2 do not substantiate anything greater than a mere vague suspicion of participation in criminal activity.

It cannot be overemphasized that judicial scrutiny must precede the search and seizure not follow it. *Heller* v. *New York*, 413 U.S. 745; *Roaden* v. *Kentucky*, 413 U.S. 757.

On the issue of what may be considered in determining probable cause for the issuance of the 113 W. 42 St. warrant, only that affidavit in support thereof and the warrant itself can establish probable cause, *U.S.* v. *Roth,* 391 F.2d 507; *Acosta* v. *Beto,* 297 F. Supp. 89, affd. 425 F.2d 963, cert. den. 400 U.S. 928; *U.S.* v. *LaBerge,* 267 F. Supp. 686; *U.S.* v. *Sims,* 201 F. Supp. 405.

Officer Gray's sworn statement contains numerous references to the "peep show" business. Clearly, the "peep show" business is not an illegal enterprise, *per se.* This fact renders certain assertions of the affiant puzzling in their support of the warrant. For example, Deponent (Gray) refers to an informant who has told him that books and records (of East Coast) ". . . reflect the peep show business."

Is Officer Gray informing Judge Weiss (who issued the subject Warrant) that a given corporation maintains books and records regarding a legal business—peep show? Have any further facts been introduced in this affidavit to establish even a suspicion of illegal activity of any kind on the part of East Coast? What does the term "reflect" mean?

The affidavit is clearly a travesty in its overt failure to establish a basis for probable cause. The affiant still refers to one still photograph affixed to a box of film marked "Sex Nurse" as the only basis for criminality of *any* kind at *either* of the premises in question. Even if that snapshot justifies more than mere suspicion of any criminal act with regard to the property at 210 West 42nd Street, how does it lead to a conclusion that a massive seizure of records at other premises is justified or that wholesaling obscenity may be reasonably inferred? It cannot be overemphasized that the film "Sex Nurse" was never seized (not on inventory) and may not have even been on the premises.

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East Coast is still engaged in a business the subject matter of which is presumptively protected by the First Amendment. Neither it nor appellant has ever been convicted on any obscenity charge. On what basis in 'probable cause' does Warrant No. 3 issue?

The Fourth Amendment to the United States Constitution placed restrictions on the issuance of search warrants largely for the purpose of limiting the abuses of "general warrants" against which the courts of England had waged a long and ultimately successful battle. See, e.g., *Wilkes* v. *Wood*, 19 How St Tr 1153 (1963).

At issue in this case is the question of whether the warrant issued by Judges Weiss and Solniker for the search of East Coast offices at 113 West 42nd Street and the seizure of "books and records" of several corporations were "general warrants".

The relevant language of the warrant at issue reads as follows:

> "You are therefore commanded at anytime to make an immediate search of East Coast Cinematics Inc. of 113 West 42nd Street, 17th floor . . . for books and records of East Coast Cinematics., Inc. reflecting a 'peep show' business in New York County in violation of 235.06 of the Penal Law . . ."

No contraband, *per se*, is noted for seizure by the warrant. No classes of items other than financial records or "books and records" are listed in the warrant. Within the categories of items designated for seizure, no examples are given, no restrictions imposed, no sub-classes denominated, and no qualifying language employed other than the single phrase "reflecting a peep show business", etc.

The basis for this conclusion that this is a general warrant can be most easily viewed by examining the land-

mark case of *Stanford* v. *Texas,* 379 U.S. 476, 13 L.Ed. 2d 431, 85 S. Ct. 506 (1965). *Stanford* is almost directly on point with the instant case since it resolves a Fourth Amendment question in the context of a First Amendment fact pattern.

In *Stanford,* a warrant was issued authorizing search and certain seizures from residential premises occupied by an individual believed by local law enforcement authorities to be engaged in violation of the *Suppression Act,* Texas statute banning Communist Party activities within that state (379 U.S., at 477).

The warrant authorized law enforcement officers to enter that individual's home and search for and seize ". . . books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas . . ." (379 U.S., at 478 and 479).

The warrant embraced both presumptively First Amendment protected materials such as "pamphlets" and material such as "memoranda" which clearly falls outside the ambit of that Amendment.

As in the instant searches and seizures, law officers seized every related item on the premises, from a book by Mr. Justice Hugo Black (379 U.S. at 479, 480), to the marriage certificate, insurance policies and personal correspondence of the individual whose premises were searched. Such a method of execution underlines the abuses inherent in the issuance of vague and broadly phrased warrants. The manner of execution, however, did not incur the specific criticism of the Court. Rather it was the language of the warrant itself that was attacked.

Referring to the language describing items to be seized the Court held that:

> "The indiscriminate sweep of that language is constitutionally intolerable. To hold otherwise would be

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> false to the terms of the Fourth Amendment, false to its meaning, and false to its history." (379 U.S. 486)

The opinion of the Court, as articulated by Mr. Justice Stewart, develops the historical basis for the constitutional protection embodied in the Fourth Amendment. The discussion focuses to a great extent on the eighteenth century struggle in England to restrict the "general warrant" employed by officers of the Crown in the search for evidence of, and as incidental harassment of individuals suspected of, the crime of "seditious libel". See, *Stanford* v. *Texas*, 379 U.S. 476, at 482, 483.

The Court extensively paraphrases the holding of Lord Camden in the famous English case of *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (1765), as cited in *Stanford* v. *Texas*, 379 U.S. 476, at 483, 484. The following language describing that case is instructive in perceiving the motivation and purpose of the Court in the *Stanford* holding:

> A warrant was issued specifically naming him and that publication, and authorizing his arrest for seditious libel and the seizure of his "books and papers". The King's messengers executing the warrant ransacked Entick's home for four hours and carted away quantities of his books and papers. In an opinion which this Court has characterized as a wellspring of the rights now protected by the Fourth Amendment, Lord Camden declared the warrant to be unlawful. "This power", he said, "so assumed by the secretary of state is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper."

The decision in *Stanford* v. *Texas*, that ". . . we think it is clear that this warrant was of a kind which it was the

purpose of the Fourth Amendment to forbid—a general warrant". (379 U.S., at 480), arises from the nexus of Supreme Court holdings distinguishing allegedly obscene materials from other forms of "contraband". (See, e.g., *Roaden* v. *Kentucky, supra,* and *A Quantity of Books* v. *Kansas,* 378 U.S. 205), with the principles embodied in the Fourth Amendment and illustrated by cases such as the English prototype of *Entick* v. *Carrington.* This nexus has long been recognized by the Court as highlighting the significance of the Fourth Amendment in its relation to rights protected by other Amendments. See, e.g., dissenting opinion of Mr. Justice Douglas in *Frank* v. *Maryland,* 359 U.S. 360, at 376.

Citing and quoting from *Marron* v. *United States,* 275 U.S. 192, at 196 (1927), the Court recapitulated its reasoning regarding the *Stanford* warrant:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. *As to what is to be taken, nothing is left to discretion of the officer executing the warrant.*" (Emphasis added)

The warrants in the instant case, as received above, are even more general than the *Stanford* warrant.

The warrant names "books and records" as the objects of seizure without an attempt to restrict same to the crime allegedly evidenced by certain "obscene" films. The reference to the particular statutory section violated is not a helpful guide to the executing officers. § 235.06 of the New York Penal Law reads as follows:

> "A person is guilty of obscenity in the first degree when knowing its content and character, he wholesale, promotes or possess with intent to wholesale promote, any obscene material." (39 McKinney's 53)

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What direction does this reference afford the officer executing the warrant? He is searching "books and records." How will he know which "reflect" the crime defined above? May he seize records relating only to the three "obscene" films? Must he seize all papers on the premises? Clearly, the warrant leaves *every* aspect of the search and materials to be seized to discretion of the executing officers. This is a *direct* contradiction of the principles of *Stanford* and *Marron.*

It is illegal as a "general warrant."

The Circuit Court relied on *United States* v. *Scharfman,* 448 F.2d 1352 (2d Cir. 1971), as justification for the seizure of "books and records" pursuant to warrants employing that term.

It must be pointed out that the nature of the crime (or contraband) considered in the *Scharfman* warrant diverges entirely from the apparent First Amendment related activity of East Coast which is the subject of the warrants examined in this action. *Scharfman* involved the seizure of furs, and various "instrumentalities" of the crime evidenced thereby. The Court upheld the use of the term "books and records" as a generic description of items to be seized *only* in a warrant that qualified such general language by reference to a precise defined crime (as opposed to the "obscenity" allegation herein) and by including that generic class with other classes of items to be seized relating to the alleged criminal activity, *including* the contraband itself.

Such is preeminently *not* the case with the warrants in the instant action where the *only* definition of items to be seized is a *generic* term. *Scharfman* does not articulate the principle that employment records, electric bills, fire insurance policies, personal notebooks, ledgers of petty cash expenses, etc., can all be seized pursuant to a warrant authorizing seizure of "books and records" relating

to the crime of obscenity without the language of such a warrant constituting an unconstitutional "general warrant."

Lastly it should be noted that, unlike the seizure in *Scharfman,* the seizures authorized by the warrants herein effectively halted the dissemination of protected expression by putting appellant out of business. This effected a total prior restraint as surely as the cloture in *Near* v. *Minnesota,* 283 U.S. 697. The general warrant authorizing such prior restraint is, therefore, invalid under the First Amendment as well as the Fourth.

While the material seized herein was recognized by the Courts of the State of New York and the U.S.D.C. for the Southern District, to have been seized unlawfully in violation of the First Amendment, resulting in the suppression and return of the seized material by the respective courts, and while the District Court opinion below clearly manifests the attempt by the trial judge to come to grips with the First Amendment problems raised by the seizures herein, the Court of Appeals totally ignored the issues, relying on *Scharfman* in this *First Amendment* case.

CONCLUSION

The evidence seized, without which there could have been no conviction, should have been suppressed, and, consequently, the judgment of conviction should be reversed.

Respectfully submitted,

HERBERT S. KASSNER,
Attorney for Appellant.

KASSNER & DETSKY,
of Counsel.

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APPENDIX A

Judgment of Affirmance.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and seventy-five.

Present: HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
HON. ELLSWORTH VAN GRAEFEILAND
Circuit Judges

75–1333

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARTIN J. HODAS,

Defendant-Appellant,

HERBERT J. LEVIN,

Defendant.

Appeal from the United States District Court for the Southern District of New York.

Judgment of Affirmance.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

by Vincent A. Carlin
Chief Deputy Clerk

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APPENDIX B

District Court Opinion Denying Motion to Suppress

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Cr. 295

UNITED STATES OF AMERICA,

against

MARTIN J. HODAS and HERBERT J. LEVIN,

Defendants.

METZNER, D.J.:

The defendants are charged in an indictment with tax evasion. They move to suppress as evidence the books and records seized from the business premises of East Coast Cinematics, Inc. (East Coast), 113 West 42nd Street, New York, N.Y. Defendant Hodas is the president and 100 per cent stockholder of East Coast. Levin is its vice-president. They claim that the books and records are "fruit of the poisonous tree" and that they were obtained pursuant to a "general" warrant.

An evidentiary hearing was held on this motion which developed the following facts. On January 27, 1972, Detective Donald Gray of the Public Morals Division, Central Investigation Unit of the New York City Police Department, obtained a search warrant to search "210 West 42nd Street, ground floor bookstore, store area and cash register" for a named obscene magazine, and books and records related to its purchase and sale. This bookstore is oper-

ated by one Black Jack Books, which is not connected with East Coast. The validity of this warrant is not questioned.

The premises were divided into three parts, a bookstore area, an area containing "peep show" machines set up for operation, followed by a closed area accessible only through a door in the rear of the peep show area. The public could freely move in the first two areas. The door to the rear *was open* when the detective entered the premises. He observed a man working on a film coating machine inside the door.

Once inside the room Gray noticed a film box which had a still photo pasted to it. *By looking at the film leader,* he saw the title "Sex Nurse," and by *looking at the frames,* he saw that the film was "Sex Nurse," which had been "deemed" obscene. This "deeming" was the result of a nonadversary finding by Judge Robert Haft less than one month previously. Upon further examination he noticed other films and film boxes, among them several marked "Superman" and "Piss on Susan," titles he knew to have been seized in other raids.

The man at the film coating machine stated that the premises were operated by East Coast, not by the bookstore, and took the detective downstairs to prove this fact. In the basement Gray observed in excess of 100 peep show machines. Gray also discovered a certificate of occupancy showing that East Coast, whose address was listed as 113 West 42nd Street, was the tenant of the premises.

By this time Assistant District Attorney John Jacobs had arrived. On his instructions, nothing was seized from the East Coast premises, but Gray went downtown to Jacobs' office where he obtained copies of "Superman" and "Piss on Susan" that had been seized in other raids on other stores. He took these films to Judge Weiss who viewed them and issued a search warrant for the East Coast premises at 210 West 42nd Street for these two films

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and for "Sex Nurse," as evidence of the crime of wholesale promotion of obscene materials, N.Y. Penal Law § 235.06. According to Gray's affidavit, "Sex Nurse" had been deemed obscene by Judge Haft.

At the same time, based on a separate affidavit which only referred to "Sex Nurse," Judge Weiss issued a warrant for the search of East Coast's offices at 113 West 42nd Street for "books and records of East Coast Cinematics Inc. reflecting a 'peep show' business New York County in violation of 235.06 of the Penal Law . . . ." Pursuant to this warrant, police seized certain corporate books and records from defendants' desks and files which were used to obtain the indictment charging income tax evasion. It is these books and records that defendants seek to suppress.

I. *Standing*

There is no question that the initial warrant was properly issued. The question is whether it was legally executed as it affects these defendants.

The government argues that defendants lack the standing to attack the seizure of the records. In *Brown* v. *United States*, 411 U.S. 223 (1973), the Court, in its most recent formulation of the standing requirements for Fourth Amendment claims, found no standing where the defendants

> "(a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *Id.* at 229.

It is obvious that defendants here were neither on the premises nor was possession of anything searched for, or

later seized, an element of the crime with which they are charged. Accordingly, in order to have standing, defendants here must show a sufficient proprietary or possessory interest in the premises at 210 West 42nd Street.

In *Mancusi* v. *DeForte,* 392 U.S. 364 (1968), the Court held that a union representative had standing to suppress evidence of the union's records seized illegally from a desk in his office in the union's premises. Of course, he had no personal possessory or proprietary interest either in the records or in his office space. However, the Court stated that:

> "capacity to claim the protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion." *Id.* at 368.

The Court noted that DeForte spent a considerable amount of time in his office, and that the records seized were in his actual custody at the time of seizure.

In the instant case, it is true that the premises at 210 West 42nd Street were leased by East Coast, of which Hodas was the sole stockholder and both defendants were officers. However, neither maintained offices at this location. They were there *only irregularly.* East Coast's portion of the premises was open to employees of the bookstore who had to pass through to reach the rest room. There were no desks for the defendants, no files, no designated areas in which they worked. Thus, the defendants cannot achieve the expectation of privacy referred to in *Mancusi* and do not have standing to challenge the execution of the search of 210 West 42nd Street.

Even if these defendants have standing to attack the search, they have failed to sustain their burden of proof that the search of 210 West 42nd Street was illegal.

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Turning now to the search of 113 West 42nd Street. In that location both defendants had desks from which most of the records were taken. They had custody of the corporate records at that time. This is the *Mancusi* situation exactly, and the requisite expectation of privacy is present. Accordingly, they have standing to challenge both the warrant issued and the execution of that warrant as to 113 West 42nd Street.

At this point it must be emphasized that we are not dealing with fruit of the poisonous tree.

II. *Probable Cause*

Defendants argue that Judge Weiss did not have probable cause to issue a warrant for 113 West 42nd Street in that there was insufficient basis to believe that East Coast was operating a wholesale business in an obscene matter.

Defendants first argue that the affidavit submitted to obtain this warrant was deficient in that it only mentioned the film "Sex Nurse," a film which Judge Weiss had not viewed, and which had only been "deemed" obscene by another judge. They rely heavily on *People* v. *Gomez*, 73 Misc. 2d 623, 342 N.Y.S.2d 903 (N.Y.C. Crim. Ct. 1973), which held that in seizing obscene materials, a "deeming" must be made by the judge issuing the warrant, and that reliance on another judge's determination, prior to a determination at an adversary hearing, is impermissible. While this court has serious doubts about the foundation for this ruling, it need not decide the issue, because this warrant was issued not for the seizure of obscene materials, but for the seizure of books and records. Unless such seizure amounted to a wholesale seizure for the purpose of stopping distribution of material protected by the First Amendment, see *infra*, there is no First Amendment protection that attaches to the corporate records here involved.

I find that the finding of Judge Haft, in addition to the other averments in the affidavit, is sufficient to support a finding of probable cause in this case.

Some effort was made by the defendants to prove at the hearing that in fact the coating was being performed for third persons. They failed in this attempt which, in any event, would not have been helpful in determining probable cause. Hundreds of peep show machines on the premises and hundreds of reels of film can lead a reasonable person to believe that they belong to the owner.

Finally, defendants argue that there was no guarantee that the films seen by Detective Gray were the same as those deemed obscene by Judge Haft, or seized from the other locations and presented to Judge Weiss. Defendant argues that, since films tear, are edited, and the like, there are no two films the same, and that therefore, a finding of probable cause is impossible. While it may be true that a pornographic film varies slightly from copy to copy, it is unlikely, to say the least, that a rip or tear would turn it into the Shirley Temple movie that defense counsel opines is shown in the rear of Forty-Second Street bookstores. In all probability, there are sufficient similarities to allow the judge to make a decision as to obscenity on what is reasonably believed to be an identical copy.

Accordingly, I find that there was probable cause to issue the warrant for the search of 113 West 42nd Street.

III. *"General" Warrant*

Defendants claim that the warrant for 113 West 42nd Street was a general warrant as prohibited by *Stanford* v. *Texas,* 379 U.S. 476 (1965). On the contrary, the instant case differs from *Stanford* in almost every key respect. First, in *Stanford,* the search was of a private home where the defendant resided, and where he carried on a mail order business. The materials to be seized were rec-

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ords of the Communist Party of Texas. Second, and more importantly, the rule in *Stanford* is that "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and *the basis for their seizure is the ideas which the contain.*" Id. at 485 (emphasis added).

The Court noted that:

> "The word 'books' in the context of a phrase like 'books and records' has, of course, a quite different meaning. A 'book' which is no more than a ledger of an unlawful enterprise thus might stand on a quite different constitutional footing from the books involved in the present case. . . . And in some situations books even of the kind seized here might, for purposes of the Fourth Amendment, be constitutionally indistinguishable from other goods—*e.g.*, if the books were stolen property." *Id.* at 485 n.16 (citation omitted).

Here, the court is dealing with business papers related to an allegedly illegal operation. The books themselves are not the type of books under discussion in *Stanford.*

In *United States* v. *Scharfman,* 448 F.2d 1352 (2d Cir. 1971), *cert. denied,* 405 U.S. 919 (1972), the Court of Appeals stated, in a case dealing with books and records related to a theft of furs, that "a general search for books and records was not directed by the warrant. Only those books and records used as 'means and instrumentalities of the crime' were or could have been seized pursuant to the warrant." *Id.* at 1355. The same is true in this case. Defendants, however, seek to distinguish *Scharfman* on the ground that it does not deal with a First Amendment situation. It is true that decisions in this district have held that, prior to a proper determination of obscenity, mass seizure of all business records of a concern precluding it from operating a legitimate business in items protected by the First Amendment constitutes a prior restraint. *G.I.*

Distributors, Inc. v. *Murphy,* 336 F. Supp. 1036 (S.D.N.Y.), *rev'd on other grounds,* 469 F.2d 752 (2d Cir. 1972), *vacated and remanded,* 413 U.S. 919, *prior reversal reaff'd* 490 F.2d 1167 (2d Cir. 1973), *cert. denied,* 416 U.S. 939 (1974); *Star Distributors, Ltd.* v. *Hogan,* 337 F. Supp. 1362 (S.D.N.Y. 1972).

Both cases were decided prior to the Supreme Court ruling in *Heller* v. *New York,* 413 U.S. 483 (1973), in which the Court held that an adversary proceeding was not required prior to seizure. A nonadversary proceeding "deeming" obscenity now suffices.

In addition, both of the district court cases held only that the records had to be returned, and specifically directed that the records be held available to law enforcement authorities. In fact, defendants in this action had their records returned in a separate action under 42 U.S.C. § 1983. *Hodas* v. *Hogan,* 72 Civ. 554 (S.D.N.Y. February 15, 1972) (Bauman, J.). Thus, their First Amendment rights have been sustained, but that is not the issue here.

The purpose behind the ruling, if valid, after the *Heller* holding, is to protect the right of the public to obtain protected material, and to avoid prior restraint. It is not to protect the holder of records that are evidence of criminal activity. It does not mean that the records may be suppressed as evidence.

Affidavits for warrants must be construed liberally and flexibly, under all the circumstances, with a view to the pressures of time and in the interests of justice. *Spinelli* v. *United States,* 393 U.S. 410 (1969); *United States ex rel. Rogers* v. *Warden,* 381 F.2d 209 (2d Cir. 1967). Judge Weiss had just viewed the films "Piss on Susan" and "Superman," the films found at 210 West 42nd Street, and deemed them obscene in connection with Gray's affidavit for the search of 210 West 42nd Street. At the very same time he approved the search of 113 West 42nd Street. It is fair to conclude that he relied on all the facts of which he was aware at the time.

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Finally, defendants argue that the finding of Judge Bauman, mentioned above, that the search was a mass seizure, is binding on this court. Questions of collateral estoppel are rare in federal criminal cases. However, several factors should be noted here. First, the United States was not a party to the action before Judge Bauman, and has not had an opportunity to litigate the issue. Second, there has been a vital change in the law [*Heller* v. *New York, supra*] since Judge Bauman's decision, a factor that prevents the operation of collateral estoppel. *Commissioner of Internal Revenue* v. *Sunnen,* 333 U.S. 591 (1948); *Neaderland* v. *Commissioner of Internal Revenue,* 424 F.2d 639 (2d Cir. 1970). Therefore, I find that any finding of fact that may have been made by Judge Bauman is not binding on this court.

I might add that, as to the reasonableness of the search in question, the New York Penal Law defines the only essential difference between the crime of promotion of obscene materials (a misdemeanor), and the *wholesale* promotion of obscene materials (a felony), as the intent to resell the material. N.Y. Penal Law §§ 235.00(4), 235.00(5) (McKinney & Supp. 1967 & 1974). It is difficult to see how such a crime could ever be proved if not through the evidence of business records related to the offense.

For all of the above reasons, the motion to suppress must be denied.

This case will proceed to trial on Monday, July 21, 1975, at 10:00 A.M. in Room 2703. Briefs, requests to charge and voir dire questions shall be filed with the court in chambers, Room 2201, on or before July 15, 1975.

So ordered.

Dated: New York, N.Y.
June 10, 1975

CHARLES M. METZNER
U. S. D. J.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1001

MARTIN J. HODAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals rendered no opinion. The opinion of the district court (Pet. App. B 32-40) denying petitioner's motion to suppress is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1975 (Pet. App. A 30-31). The petition for a writ of certiorari was filed on January 15, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause for a search warrant authorizing the seizure of books and records reflecting the operation of a "peep show" business in violation of state law.

2. Whether the search warrant was a "general warrant" in violation of the Fourth Amendment.

3. Whether the seizure of the books and records was an impermissible "prior restraint" under the First Amendment.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of attempting to evade the corporate income tax of East Coast Cinerama Theatre, Inc., for the fiscal year ending February 28, 1969, in violation of 26 U.S.C. 7201, and of making a false statement on East Coast's income tax return for the same year, in violation of 26 U.S.C. 7206(1). He was sentenced to concurrent terms of one year's imprisonment. The court of appeals affirmed without opinion (Pet. App. A).

The principal question presented is whether the district court correctly refused to suppress East Coast's financial records, which had been seized by the New York City police during the execution of a warrant for a search of its offices at 113 West 42nd Street, in New York City.

After an evidentiary hearing, the district court filed a written opinion, setting forth findings of fact (Pet. App. B) which may be summarized as follows: On January 27, 1972, the New York City police obtained a warrant to search premises occupied by East Coast at 210 West 42nd Street for three films which were alleged to be obscene in violation of Section 235.00 of the New York State Penal Law. The validity of this warrant is not at issue (Pet. App. B 32-33).

On the same occasion, and from the same state court judge, the police obtained a second warrant to search the offices occupied by East Coast at 113 West 42nd Street for

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"books and records" of East Coast "reflecting a 'peep show' business in New York County in violation of 235.06 of the Penal Law." The second warrant recited that the police had probable cause to believe that the books and records reflected "the wholesale operation of a 'peep show' business including the use of obscene movies and that said books and records will be evidence of the crime of wholesale promotion of obscene material," in violation of the New York statute.

An affidavit by a police officer in support of the first warrant (210 West 42nd) stated that he had observed at East Coast's premises at that address more than 100 peep show machines, more than 100 projectors, hundreds of reels of film (including reels of the three films named in the warrant, one of which had been held to be obscene a month earlier by another state court judge), film cutting machines, and materials and tools for assembling peep show machines.[1] The other two films were submitted with the affidavit for review by the State Court (App. 40a-41a, 80a, 163a).[2]

The affidavit by the same officer in support of the second warrant (113 West 42nd Street) repeated the statements in the first affidavit, except that it identified only one of the films (the film earlier deemed obscene by another state court judge). This affidavit also stated that persons identifying themselves as employees of East Coast had informed the officer that petitioner was the owner and sole shareholder of East Coast and that East Coast's

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[1]The police officer's observation of East Coast's operations at 210 West 42nd Street had occurred during the execution of an earlier search warrant for a bookstore which apparently shared the premises at that address with East Coast. In the district court and in the court of appeals petitioner unsuccessfully claimed that the initial search at 210 West 42nd Street was illegal and "tainted" the subsequent search of 113 West 42nd Street (Pet. App. B 34-35). Petitioner has now abandoned that contention.

[2]"App." refers to the record appendix in the court of appeals.

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books and records for its peep show business were located at its offices at 113 West 42nd Street (see also App. 42a-43a).

Before issuing either warrant, the state court judge viewed two of the three films named in the first warrant but did not view the third film, which was the only film referred to in the affidavit in support of the second warrant (113 West 42nd Street). Pursuant to the second warrant, the police seized East Coast's financial records from its offices at 113 West 42nd Street. The district court refused to suppress the seized books and records prior to petitioner's trial on the income tax charges.[3]

ARGUMENT

1. Petitioner first argues (Pet. 2, 7-8, 10, 19-23) that there was insufficient evidence to establish probable cause for believing that a crime was being committed and, thus, to support the warrant for East Coast's books and records. He points out that the state judge, who issued the warrant to search East Coast's offices at 113 West 42nd Street for books and records reflecting the operation of a "peep show" business in violation of the New York obscenity statute, had not viewed the only film identified in the affidavit for the search warrant.

But the district court correctly concluded that there was no need for the state court judge to view the film specified in the affidavit and that the affidavit was sufficient to establish probable cause to believe that books and records reflecting the operation of a "peep show" business using

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[3]In a separate proceeding brought by petitioner and others in federal district court against the local district attorney under 42 U.S.C. 1983, the books and records were returned to petitioner two weeks after their seizure. However, the police were apparently permitted to retain copies of the records which were returned to East Coast; these copies were turned over to the Internal Revenue Service and used at the tax prosecution because the originals, according to petitioner's testimony, had been "disposed of" (Tr. 240).

obscene movies, in violation of state law, could be found at 113 West 42nd Street (Pet. App. B 36-37). One of East Coast's employees had told the police that the books and records of the company were located at 113 West 42nd Street and that those books reflected the operation of a "peep show" business. Simultaneously with the submission of this affidavit, the other affidavit for the search of East Coast's premises at 210 West 42nd Street was presented to the same judge (Pet. App. B 33-34, 39). This other affidavit stated that, in addition to the film specified in the other affidavit, the officer had observed two other films on East Coast's premises at 210 West 42nd Street. These films were submitted to the judge for his consideration and were viewed by him prior to issuing either warrant (Pet. App. B 33).

Thus, as the district court observed (Pet. App. B 39), "[i]t is fair to conclude that * * * [the state court] relied on all the facts of which he was aware at the time" he issued the warrant for 113 West 42nd Street. Accordingly, there was ample evidence before that court from which it concluded that there was probable cause to believe that books and records reflecting that East Coast was operating a "peep show" business, in violation of state law, could be found at 113 West 42nd Street.

Moreover, many of petitioner's claims are contradicted by the facts found by the district court. For example, petitioner states (Pet. 5, 7) that the films viewed by the state court judge before issuing the warrants had been seized by the police officer without a warrant from East Coast's premises at 210 West 42nd Street. But the district court found (Pet. App. B 33) that "nothing was seized from the East Coast premises" prior to the issuance of the warrants

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and that the films viewed by the state court judge were prints "that had been seized in other raids on other stores." This finding had ample support in the record. Although the police officer who conducted the initial search at 210 West 42nd Street testified on cross-examination at the suppression hearing that the films which he presented to the judge were seized by him at 210 West 42nd Street (App. 79a, 81a, 91a-92a), on redirect examination (after refreshing his recollection from his affidavit for the second warrant pertaining to 210 West 42nd Street), the officer stated that the films had been previously seized at other locations (App. 129a-141a). This testimony was corroborated by the testimony of an assistant district attorney who was present at the search (App. 172a).

2. Petitioner further contends (Pet. 2, 11, 15, 23) that the state court was limited to consideration of the single affidavit in support of the search of 113 West 42nd Street. But both search warrants were directed at investigating the same criminal enterprise which operated at two different locations. The affidavits were submitted simultaneously to the same judge (App. 38a) and who issued both warrants on the same day (App. 162a-163a). Under these circumstances, there is no reason to believe that the facts set forth in the first affidavit did not form a basis for the issuance of the second warrant.

The Fourth Amendment only requires that probable cause for the issuance of a warrant be "supported by oath or affirmation." A state court may resort to evidence other than that in the supporting affidavit in making a probable cause determination. *Campbell* v. *State of Minnesota*, 487 F.2d 1, 4-5 (C.A. 8); *United States ex rel. Gaugler* v. *Brierley*, 477 F.2d 516, 520 (C.A. 3); *Boyer* v. *State of Arizona*, 455 F.2d 804, 806 (C.A. 9); *Radcliff* v. *Cardwell*, 446 F.2d 1141, 1143 (C.A. 6); *United States ex rel. Pugach* v.

Mancusi, 411 F.2d 177, 180 (C.A. 2). Here, where all of the evidence supporting the warrant was in affidavit form, the standards of the Fourth Amendment were met.[4]

3. Petitioner further contends (Pet. 2, 12-15, 24-29) that the warrant was a constitutionally impermissible "general warrant" and the seizure of East Coast's financial records under the authority of the warrant constituted a "prior restraint" forbidden by the First Amendment (Pet. 2-3, 9-10, 17-18). Petitioner relies upon *Stanford* v. *Texas*, 379 U.S. 476; *Near* v. *Minnesota*, 283 U.S. 697; and *Roaden* v. *Kentucky*, 413 U.S. 496. Those cases, however, involved seizure of materials which were protected by the values of free expression fostered by the First Amendment, and do not affect the validity of the seizure of financial books and records.

While this Court held in *Stanford* v. *Texas*, *supra*, 379 U.S. at 485, that "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain," it distinguished those items from the financial books and records of an unlawful enterprise. Thus, the Court specifically noted that (*id.* at 485 n. 16):

> The word "books" in the context of a phrase like "books and records" has, of course, a quite different meaning. A "book" which is no more than a ledger of an unlawful enterprise thus might stand on a quite different constitutional footing from the books involved in the present case.

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[4]The cases relied upon by petitioner (Pet. 23) are distinguishable. They hold only that information known to the police officer but not disclosed to the magistrate may not be subsequently considered in determining whether probable cause existed for a warrant.

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Since the warrant was directed only to financial books and records, and not books for the ideas which they contain, its description of the things to be seized as "books and records of East Coast Cinematics, Inc., reflecting a 'peep show' business in New York County in violation of 235.06 of the Penal Law" was sufficient under the Fourth Amendment and did not constitute a "general warrant." See *Marron* v. *United States*, 275 U.S. 192, 198-199.[5]

Contrary to petitioner's final argument (Pet. 7-13), there was no "prior restraint" in this case in violation of the First Amendment. Unlike its films, East Coast's financial books and records were not used for public exhibition. But even assuming *arguendo* that the books and records could be equated to material protected by the First Amendment, petitioner has made no showing, either here or in the courts below, that the temporary seizure of East Coast's financial records brought, or was likely to bring, "to an abrupt halt an orderly and presumptively legitimate distribution or exhibition" (*Roaden* v. *Kentucky*, *supra*, 413 U.S. at 504) of films in East Coast's "peep show" machines.

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[5]Petitioner does not argue that the seizure of the books and records violated the Fifth Amendment privilege against compulsory self-incrimination, and there is no showing that he claimed that privilege. The books and records in question here are corporate books and records to which the Fifth Amendment privilege does not apply. See *Bellis* v. *United States*, 417 U.S. 85, 89. Hence, the question presented in *Andresen* v. *Maryland*, No. 75-1646, argued February 25, 1976, as to whether the Fifth Amendment bars the seizure of an individual's books and records pursuant to a search warrant is not involved here.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1976.

DOJ-1976-04